United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

77-4192 78-6032

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CENTRAL HUDSON GAS & ELECTRIC CORPORATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., ORANGE AND ROCKLAND UTILITIES, INC., and POWER AUTHORITY OF THE STATE OF NEW YORK,

Appellants-Petitioners,

-against-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Appellee-Respondent,

and

DOUGLAS M. COSTLE, as Administrator, U.S. Evnironmental Protection Agency, ECKARDT C. BECK, Regional Administrator, Region II, U.S. Environmental Protection Agency, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and PETER A.A. BERLE, Commissioner, New York State Department of Environmental Conservation,

Appellees,

and

HUDSON RIVER FISHERMEN'S ASSOCIATION,

Intervenor-Appellee-Respondent.

UNITED STATES COURT OF APPEALS
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BRIEF OF THE HUDSON RIVER FISHERMEN'S ASSOCIATION

Dated: April 24, 1978

BUTZEL & KASS
45 Rockefeller Plaza
New York, New York 10020

Attorneys for Hudson River
Fishermen's Association

Albert K. Butzel,
Clifford P. Case, III,
Of Counsel

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket Nos. 77-4192 and 78-6032

CENTRAL HUDSON GAS & FLECTRIC CORPORATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., ORANGE AND ROCKLAND UTILITIES, INC., and POWER AUTHORITY OF THE STATE OF NEW YORK,

Appellants-Petitioners,

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

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DOUGLAS M. COSTLE, as Administrator, U.S. Evnironmental Protection Agency, ECKARDT C. BECK, Regional Administrator, Region II, U.S. Environmental Protection Agency, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and PETER A.A. BERLE, Commissioner, New York State Department of Environmental Conservation,

Appellees,

and

HUDSON RIVER FISHERMEN'S ASSOCIATION,

Intervenor-Appellee-Respondent.

BRIEF OF THE HUDSON RIVER FISHERMEN'S ASSOCIATION

This brief is submitted on behalf of the Hudson River Fishermen's Association. The Fishermen are intervenors

in Docket 77-4192 by permission of this Court, and in Docket 78-6032 by permission of the U.S. District Court.

ISSUES PRESENTED

1. Whether, under Section 509 of the Clean Water Act, this Court has exclusive jurisdiction over the subject matter of this case?

The District Court answered this question in the affirmative and dismissed, for lack of its own subject matter jurisdiction, the case now on appeal in Docket 78-6032.

2. If this Court has exclusive subject matter jurisdiction under Section 509, whether the action is time-barred by the 90-day statute of limitations included in that Section.

The District Court did not reach this question, which is brought before this Court by the petition for review in Docket 77-4192.

3. Whether this proceeding is in any event barred by the Utilities' laches?

The District Court did not reach this question.

4. If the action is not time-barred or barred by laches, whether EPA is acting within its authority in continuing to administer permits which it issued and as

to which it reserved continuing jurisdiction?

The District Court did not reach this question.

NATURE OF THE CASE

A. Background

This case comes before the Court in two forms: First, on appeal from a judgment of the United States District Court for the Southern District of New York (Carter, J.) which dismissed an action initiated in that Court (Docket No. 78-6032); and second, through petition for review in this Court pursuant to Section 509(b)(1) of the Clean Water Act (Docket No. 77-4192). The appeal and the petition for review both involve the same subject matter and have been consolidated by the Court's order of March 23, 1978.

The Hudson River Fishermen's Association was permitted to intervene in Docket 78-6032 by order of the District Court, and it participated fully in the proceedings below. By order of this Court dated March 23, 1978, the Fishermen have also been allowed to intervene in Docket 77-4192.

Described by the appellant Utilities as a "fishing club" (Utilities' Brief, p. 7), the Fishermen's Association is actually an organization of 750 commercial

and sports fishermen who have sought since 1967 to protect the fisheries of the Hudson River from despoliation by power plants and pollution (JA. 289-92).* They have been active in pursuing such protection both before administrative agencies (e.g., the Federal Power Commission, the Atomic Energy Commission, the Corps of Engineers) and in the courts (e.g., Hudson River Fishermen's Association v. Federal Power Commission, 498 F.2d 827 (2d Cir. 1974); they have long been parties to cases addressing the fisheries impacts of the power plants in issue here (e.g., the Indian Point, Bowline and Roseton Plants); and they are now actively involved in the EPA proceedings challenged by the Utilities in their appeal and petition for review. It is with this background, and not as a "club", that the Fishermen have joined this case (JA. 289-94).

B. The Facts and Proceedings Below

The central subjects of this action are three electric generating stations on the Hudson River -- those at Indian Point near Peekskill, Bowline Point on Haverstraw Bay and Roseton north of Newburgh. All of these plants are currently in operation. Unfortunately, as they generate power, they also draw in large amounts of Hudson River

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* The prefix "JA." denotes references to the pages of the Joint Appendix previously filed with the Court.

water which, after cooling the station condensors, is discharged back to the River at elevated temperatures. In the course of this process, the eggs and early life stages of striped bass and other fish, too small to be screened, are also drawn into the plants and destroyed in substantial numbers; and as the impacts have begun to accumulate, the risks of irreparable damage to the fisheries have become increasingly serious. Recent estimates by the Oak Ridge National Laboratory, for example, indicate that continued operation of the plants with their current configuration of "once through" cooling could kill up to 74% of the striped bass population of the Hudson (JA. 75-76, 533, 581-87).

It is impossible, however, with the dependence of New York City on a continuous electric supply, to close these plants down, whatever the damage to the Hudson. As a result, the direction has been to seek a reduction in the intake of young fish by reducing the amount of water drawn in, and also to diminish the discharge of heated water to the River. To this end, cooling towers (which are widely used at power stations across the country) have been recommended. These would reduce by 90% the volumes of water which the Indian Point, Bowline and Roseton Plants draw in and subsequently disgorge, and

would similarly reduce the fish that are now caught and sucked up by the plants (JA. 78, 533-34).

With the passage of the Federal Water Pollution Control Act (now the "Clean Water Act") in 1972, the U.S. Environmental Protection Agency was vested with the authority to assess the type of damage that was being done on the Hudson, and to condition, through a comprehensive permit program, the permissible methods of discharge and intake at power plants. Pursuant to the requirements of the Act, the Utilities duly made application to EPA to authorize the ongoing discharges at Indian Point, Bowline and Roseton; and in 1975, after lengthy study and opportunity for comment by the Utilities and agency scientists, EPA issued permits which effectively required cooling towers (or some other method of "closed-cycle" cooling) at each of the plants (JA. 76-78).

The Utilities promptly asked EPA for adjudicatory hearings on the permit conditions that required closed-cycle cooling, claiming that the requirements were not justified (JA. 79, 388). These requests were granted in the spring and summer of 1975 (JA. 79-80). As a result, and in accordance with the regulations EPA had adopted governing adjudicatory hearings [40 CFR §125.35(d)(2)], the conditions requiring closed-cycle cooling were auto-

matically stayed -- and they will remain so until a conclusion is reached following the hearings.

Against this background -- with no legal compulsion to implement closed-cycle cooling pending the results of the adjudicatory proceedings -- the Utilities did not exactly rush ahead to the hearings themselves. Far from it: Invoking river studies that had been underway for some time, the Utilities asked that the hearings be postponed for two years, when such studies would supposedly be completed (JA. 485-86, 504-05). EPA agreed; and thus from the summer of 1975 to the spring of 1977, the plants continued to operate with once-through cooling, drawing in and killing fish, while the Utilities gathered their data, assembled their conclusions and reported regularly to EPA.

Finally, in February 1977, the parties to the adjudicatory hearings were called together to set a schedule for the submission of testimony and for cross examination. Not unexpectedly, the Utilities continued to seek delay. Despite the lengthy studies that they had promised to complete, the Utilities wanted still more time to do further work, and they vigorously resisted any early starting date. More critically, in a complete departure from everything that had gone before, the Utilities announced their view that EPA no longer had jurisdiction to conduct the adju-

dicatory hearings, but that the responsibility fell instead upon the New York State Department of Environmental Conservation ("DEC") (JA. 81, 535).

The purported basis of the Utilities' position was that in October 1975, EPA, acting in accordance with Sections 402(b) and 402(c) of the Clean Water Act, had approved a State program pursuant to which DEC was authorized, in place of EPA, to issue further discharge permits under under the Act. Upon this approval, EPA's own permit issuing authority was generally suspended in New York; and although permits for Indian Point, Bowline and Roseton were already outstanding, the Utilities claimed that with approval of the State program, EPA's role, including any responsibilties with respect to adjudicatory hearings that it had scheduled, came to an end.

The transfer of authority upon which the Utilities rested their claim had taken place in October 1975 -- 15 months before the companies bothered to assert their claim; and there is no doubt that the Utilities were fully aware of the transfer and its terms, which had been reported in the Federal Register (JA. 249-52, 327-29). In the interim, moreover, all parties, including the Utilities, had proceeded on the basis that EPA had continuing jurisdiction. Thus, in seeking waivers under Section 316(a) of the Act, the Utilities submitted their plans of study to EPA, not

DEC; correspondence regarding contested conditions was directed to EPA, not DEC; and EPA, not DEC, conducted all negotiations looking to partial settlements and stipulations. Furthermore, during this period, EPA, in order to prepare for the adjudicatory hearings, assembled a task force of government experts and placed its own staff at work analyzing the Utilities' submissions. DEC, in contrast, relying entirely on EPA to conduct the hearings, sat in on some of the discussions, but otherwise did (and has done) nothing to prepare (JA. 335-37, 536-37).

For the Utilities, the fact that EPA, and not DEC, had been preparing for the hearings (and that the Utilities themselves had dealt with EPA, rather than DEC) presented no obstacle. To the contrary, if EPA were disqualified from conducting the hearings, there was no question but that the commencement of any adjudicat y proceedings would have to be deferred. DEC had not begun to prepare for such hearings; and based on the length of time EPA had taken, two years of added delay would likely result. Furthermore, there was serious doubt that DEC would have the personnel to take on the adjudicatory role (JA. 309-10). Meantime, the permit conditions requiring closed-cycle cooling would remain

ineffective, and the fisheries would remain exposed.

Given their course of conduct and prior failure to complain, the Utilities' eleventh-hour assertion was questionable at best. Of equal importance, it ignored several critical factors. Prominent among these was the fact that the permits for the Utilities' plants had been issued before the transfer of authority to DEC, whereas the State program applied only to future permits. Furthermore, the transfer of authority from EPA to DEC had been made pursuant to a Memorandum of Understanding between the agencies, which expressly reserved to EPA the authority and the obligation to carry forward with pending Section 316 adjudicatory hearings (JA. 311-13, 329-31, 516-18).* This Memorandum had been provided to the Utilities in May 1975 and was explicitly identified as one of the bases for permit administration in the Federal Register notice approving the State program (JA. 250-51, 328). Beyond that, the hearings on the Indian Point, Bowline and Roseton plants were precisely the type of Section 316 adjudicatory proceedings identified in the Memorandum.

Against this background, the Utilities' claim that EPA lacked jurisdiction (and, as of February 1977, had presumably lacked such jurisdiction for 15 months) rang

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* See Article I, Sections 1 and 3, of the Memorandum at JA. 312-13.

hollow when it was first made, and was rejected by the Administrative Law Judge at the prehearing conference. Nonetheless, the Utilities pressed on. At their request, the question was referred to EPA's General Counsel -- and rejected in OGC Opinion 63 (JA. 35). An action was then initiated in the U.S. District Court, seeking judicial relief. By opinion of Judge Carter filed February 10, 1978, that action was dismissed for lack of subject matter jurisdiction in the lower court (JA. 595). The Utilities appeal that dismissal and through petition for review also seek directly from this Court a declaration that EPA is without continuing authority and an injunction terminating the adjudicatory hearings that are well underway.*

For the Fishermen's Association, any such declaration or injunction would have serious effects. Its 750 members include commercial and sports fishermen who fish the waters of the Hudson for both livelihood and pleasure. The power plants currently operating on the River with one through cooling are reducing the stock,

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* The adjudicatory hearings began in December 1977 with cross examination of the Utilities' case. To date, more than 20 hearing sessions have been held, and the transcript already runs to 4000 pages. In addition, exhibits containing more than 1500 pages have been introduced.

and as the years of impact cumulate, the damage will become more and more severe. Even if EPA continues the hearings that it has started, it will probably be two years before a final administrative decision is reached and the requirement of closed cycle cooling, if reaffirmed, in a position to be implemented. If, on the other hand, EPA is ousted of its role and DEC required to take over, that will mean further lengthy delays, likely extending by two years the date of any final administrative decision, with the ever increasing risk of irreparable damage to the fisheries. Faced with this threat, and believing the Utilities' claim to be without merit and unconscionably late, the Fishermen ask this Court to affirm Judge Carter's judgment and then, in its own right, to dismiss the petition for review.

SUMMARY OF ARGUMENT

The Fishermen agree with the Utilities that the issues raised in th. proceeding are ripe for review. There is no further need to exhaust administrative remedies or to return the matter to the District Court. We agree with the Utilities that this Court can and should decide the controversy now.

We disagree that the District Court had (or has) jurisdiction over the subject matter of this case. The District Court properly held that under Section 509(b) of the Clean Water Act, the Court of Appeals has exclusive subject matter jurisdiction. This is so because the controversy involves the issuance of a permit under Section 402 and, even more clearly, a determination by EPA regarding New York State's permit program. See, Sun Enterprises Ltd. v. Train, 532 F.2d 280 (2nd Cir. 1976); American Petroleum Institute v. Train, 526 F.2d 1343 (10th Cir. 1975). Accordingly, the District Court's judgment should be affirmed, and the Utilities relegated to their remedy of direct review in this Court pursuant to Section 509(b).

Under Section 509(b)(1), however, any challenge to an EPA determination regarding a State permit program or the issuance of a permit must be made within 90 days of the determination. Here, the transfer of permitting authority

giving rise to the Utilities' claim (including the determination whereby, in connection with the State program, EPA retained jurisdiction over the permits here in issue) took place in October 1975. The Utilities' petition for review was not filed until two years later. The claims are therefore barred by the 90-day statute of limitations set forth in Section 509(b)(1). Peabody Coal Co. v. Train, 518 F.2d 940 (6th Cir. 1975); Sun Enterprises v. Train, supra.

Furthermore, even if the Utilities' claims were not barred under Section 509(b)(1), the petition for review should be dismissed due to the companies' laches. Despite EPA's supposed loss of jurisdiction in October 1975, the Utilities never raised any complaint, but to the contrary continued to deal with EPA as the proper permitting agency, until the adjudicatory hearings were about to begin in February 1977. In the meantime, EPA had been preparing for the hearings, whereas DEC had not, so that if EPA were now ousted of authority, two years would be lost, with consequent added impacts on the fisheries. There being no excuse for the Utilities' delay, their claims should be barred by their laches. Ecology Center For Louisiana Inc. V. Coleman, 515 F.2d 860 (5th Cir. 1975); East 63rd Street Association

v. Coleman, 414 F.Supp 1318 (S.D.N.Y. 1976), aff'd by order 538 F.2d 309 (2d Cir. 1976).

Finally, if the action is not barred by the Utilities' delay, it should be dismissed on the merits. Despite the Utilities' highly technical readings, there can be no doubt that the permits involved here were "issued" before EPA approved New York's program. Furthermore, even if they had not been "issued" within the meaning of the Act, EPA and DEC were fully authorized to agree to the Federal agency's continuing responsibility over the power plant permits.

ARGUMENT

POINT ONE

THE DISTRICT COURT PROPERLY HELD THAT THE COURT OF APPEALS HAS EXCLUSIVE JURISDICTION OVER THE SUBJECT MATTER OF THIS ACTION

The District Court dismissed the Utilities' action initiated before it on the grounds that it had no subject matter jurisdiction. Judge Carter concluded that under Section 509(b) of the Clean Water Act [33 U.S.C.

§1369(b)], exclusive jurisdiction to review the Utilities' claims rested with this Court (JA. 595). That holding was, we submit, correct and should be affirmed.

Section 509(b)(1), describing the jurisdiction of the Court of Appeals in reviewing actions by EPA, provides in pertinent part:

> "Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, or 1316 of this title, and (F) in issuing or denying any permit under section 1342 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business, upon application by such person." (emphasis added)

The Courts of Appeals are thus expressly vested with jurisdiction to review the actions taken by EPA in the areas enumerated in Section 509(b). Within those prescribed areas, such jurisdiction is exclusive, not concurrent. Sun Enterprises, Ltd. v. Train, 532 F.2d 280, 287 (2d Cir. 1976); Petroleum Institute v. Train, 526 F.2d 1343, 1345 (10th Cir. 1975); American Paper Institute v. Train, 381 F.Supp 553 (D.D.C., 1974). Accordingly, if

the Utilities' challenge in this case involves one of the enumerated actions, this Court is without subject matter jurisdiction over the case.*

There can be no doubt that the Utilities' claim involves Section 509(b) actions which are subject to review only in the Court of Appeals. Thus, included among the matters enumerated in the Section are "any determination [of EPA] as to a State permit program submitted under Section [402(b)]", and any action taken under Section 402 "in issuing or denying any permit." [Sections 509(b)(1)(D), 509(b)(1)(F)]. The present lawsuit falls into both categories: The Utilities are, at the very least, challenging an EPA determination with respect to New York permit program, contending that EPA has improperly separated out of that program and reserved to itself continuing jurisdiction over the power plant permits. In addition, the Utilities are challenging EPA's attempted action to finalize the permits it has issued for the plants. In either case, exclusive jurisdiction rests in the Court of Appeals.

In the decision below, the District Court addressed itself only to the category of permit issuance

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* Because the jurisdiction of the Court of Appeals as to the enumerated actions is not concurrent but exclusive, the other statutes cited by the Utilities to provide a jurisdictional basis for this action in the District Court are irrelevant and inapplicable so long as Section 509(b) applies. Sun Enterprises Ltd. v. Train, supra.

[Section 509(b)(1)(F)] and thus was not required to reach the question of whether the Utilities' claims also involved a determination relative to a State permit program [Section 509(b)(1)(D)] (JA. 612, 615). As discussed below, exclusive jurisdiction rests with the Court on both bases.

A. This Action Involves A State Permit Program

Under Section 509(b)(1)(D) of the Act [33 U.S.C. §1369(b)(1)(D)], the Courts of Appeals have exclusive jurisdiction to review any EPA determinations relating to State permit programs. This is clearly such a case.

Thus, from its inception, the State permit program which EPA approved (and which the Utilities claim ousted EPA of further authority) expressly provided that EPA would retain the right, and have the obligation, to carry forward with all adjudicatory hearings (including, specifically, "hearings with respect to Section 316")* which had been initiated by EPA action prior to the transfer of authority. This was explicitly spelled out in a Memorandum of Agreement between EPA and DEC (JA. 312-13); the Memorandum of Agreement was specifically referred to in

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* Section 316 of the Act is directed primarily to intake and discharge requirements for electric generating stations, and it is the Section around which the instant adjudicatory hearings turn. In referring to this Section specifically, there is no question that EPA and DEC had expressly in mind the plants which are the subject of this action.

the Federal Register notice indicating EPA's approval of the State program [40 Red. Reg. 54462 (Nove. 24, 1975)] (JA. 250-51); and the adjudicatory hearings at issue in this action are of precisely the kind in respect of which EPA was obligated to carry forward.*

When, therefore, the Utilities challenge EPA's continuing jurisdiction over the power plant permits (and the adjudicatory hearings relating to those permits), they are in fact challenging EPA's determination with respect to the State program. Their real claim is that the EPA approval was improper insofar as it purported to retain for itself continuing jurisdiction over the power plant permits. To the extent, however, that their claim has any validity (and it does not), it is a claim that falls within the exclusive jurisdiction of this Court of Appeals since it involves and challenges as improper EPA's approval of New York State's permit program. See California v. EPA, 511 F.2d 963, 974 (10th Cir. 1975), rev'd on other grounds, 426 U.S. 200 (1976). That being so, the District Court

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* Beyond its specific reservation of EPA authority relative to adjudicatory hearings, the Memorandum of Agreement gener[illegible]ade EPA responsible for the issuance of all p[illegible]for which applications had been filed prior [illegible] effectiveness of the State program. DEC, in [illegible]rast, was to be responsible only for new applications (JA. 312). Under this test, the power plant permits remained subject to EPA's jurisdiction whether technically "issued" or not, since the applications had long since been filed.

lacked subject matter jurisdiction.

The Utilities contend in their Brief (p. 42) that they do not contest EPA's determination approving the State permit program. However, it was that determination which provided for continuing EPA jurisdiction over the power plant hearings and permits in issue in this action. When, therefore, the Utilities claim that EPA is improperly exercising continuing jurisdiction, they are directly contesting the terms of EPA's approval of New York's State permit program. There could, we submit, be no more direct a challenge to a "determination as to a State permit program."*

B. This Action Also Involves the Issuance of a Permit

Under Section 509(b)(1)(F) of the Act [33 U.S.C. §1369(b)(1)(F)], the Courts of Appeals also have exclusive jurisdiction over any EPA action in "issuing or denying any permit" under Section 402. The permits involved here are Section 402 permits; and the Utilities contend

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* The Utilities also argue at pp. 45-47 of their Brief that the Memorandum of Agreement between EPA and DEC, defining their responsibilities, is "irrelevant," since a statute cannot be amended by agreement. That is undoubtedly so, but there was no such amendment here. Of equal importance, whatever the legal effect of the Memorandum, that does not go to the question of the Court's exclusive jurisdiction. With or without the Memorandum, the Utilities' claim is still a challenge to the terms of EPA's approval of New York's permit program.

that EPA should cease further action in effecting their issuance. That is clearly a claim falling within Section 509(b)(1)(F), and thus a claim cognizable only in this Court. The District Court agreed.

The Utilities argue, however, as they argued in the District Court, that the permits involved have not been fully "issued" by EPA and that the companies' claims accordingly fall outside the scope of Section 509. This is specious. Whatever the technical definition of "issued" -- and as discussed in Point Four below, the Utilities are far off base -- EPA has, at the very least, commenced upon the issuance of the permits, and it is attempting to carry forward with that process. The Utilities, in turn, are challenging EPA's actions relative to such issuance, and that is manifestly a challenge within Section 509.

It is also essential to note that if the procedures for finalizing the permits had been completed and final permits had been issued, the Utilities' only route for review, whether based on a challenge to EPA's authority or on other factors, would have been by petition to the Court of Appeals. Sun Enterprises, Ltd. v. Train, supra. The Utilities therefore interpret Section 509 to require that review of the permit issuing process should take place in a different forum from the review

of the final permit, which is the end result of that process. Not only is such an interpretation of the Act unreasonable -- it also runs directly counter to E.I. duPont de Nemours & Co. v. Train [430 U.S. 112 (1977)], where the Supreme Court expressly recognized the Congressional policy against bifurcated District Court/Court of Appeals review under the Act.

The duPont case involved EPA's right to issue regulations governing existing discharges by category and class pursuant to Section 301 of the Act. The Supreme Court held that EPA did have such authority; and one of the reasons it gave for this conclusion was that otherwise, the regulations for existing sources would have been reviewable only in the District Court, whereas regulations for new discharges would be reviewable only in the Court of Appeals. The Supreme Court found it "almost inconceivable" that Congress would have intended there to be such split review.

The facts and circumstances are even more compelling in the instant case. For here what is involved is a unitary permit-issuing process, where the conclusion inevitably follows from what goes before. Here, the conclusion is only reviewable in the Court of Appeals. Similarly, the actions leading to that conclusion (which is what the Utilities are challenging) should be subject

to review at the same level. See American Petroleum Institute v. Train, supra, 526 F.2d at 1345.

POINT TWO

THE UTILITIES' CHALLENGE IS BARRED BY THE 90-DAY STATUTE OF LIMITATIONS INCLUDED IN SECTION 509 OF THE CLEAN WATER ACT

Because this Court has exclusive jurisdiction over the Utilities' claims pursuant to Section 509(b) of the Clean Water Act, the Utilities only proper remedy is through petition for review in this Court. For that reason, the action initiated in the District Court (denominated on appeal as Docket No. 78-6032) was properly dismissed. In this instance, moreover, the Utilities' challenge through petition for review (Docket No. 77-4192) must also be dismissed as time barred.

Specifically, Section 509(b)(1), which authorizes review in the Courts of Appeals, then goes on to provide that:

> "Any such application [for review] shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial [by EPA], or after such date only if such application is based solely on grounds which arose after that date."

In this case, as discussed in Point One above,

what the Utilities are actually challenging is EPA's approval of the State's permit program on terms which reserved to EPA continuing jurisdiction over the power plant permits in issue in this proceeding. That approval, by determination publicly noticed in the Federal Register, was given on October 29, 1975. Under Section 509(b), therefore, any challenge to the determination had to be brought within 90 days - or by January 28, 1976.* This was not done, and in fact, a petition for review was not filed until November 1977. In these circumstances, the Utilities' challenge is time barred. Peabody Coal Co. v. Train, 518 F.2d 940 (6th Cir. 1975); Sun Enterprises Ltd. v. Train, supra.

In an effort to avoid this result, the Utilities seek to identify the action that they challenge as the Office of General Counsel Opinion 63 which rejected the companies' claim of improper jurisdiction. This, of course, is nonsense. The action which gave rise to the Utilities' claim was the approval of October 29, 1975 - and EPA's continuing exercise of jurisdiction pursuant to that

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* Under Section 402(c) of the Act, EPA's suspension of permit issuance is supposed to take place 90 days after its approval of a State program. Arguably, therefore, the violation claimed by the Utilities did not become firm until January 28, 1976. The Petition would then have been required to be filed by April 28, 1976 -- a date missed by 18 months.

approval. The OGC Opinion simply reiterated the legality of action long since taken.*

As noted in Point One above, the Utilities also attempt to avoid the impact of Section 509(b) by claiming that they do not challenge the approval of the State program, but only EPA's failure to "suspend the issuance of permits." This is simply an exercise in semantics. However characterized, the action complained of is EPA's continuing exercise of permitting jurisdiction pursuant to and following its approval of the State program; and that is an action which was taken beginning October 29, 1975. If a judicial challenge was to be made, the Utilities could not, consistent with Section 509(b), wait as they did for two years to file their petition for review.

The practical importance of this conclusion is well demonstrated in this case. If the Utilities had asserted their claims relative to EPA's continuing role promptly following approval of the State program which included that role, the propriety of EPA's further involvement would have been promptly decided, and all

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* If the Utilities could use the OGC Opinion as the triggering event for purposes of Section 509, the 90-day statute would be meaningless in circumstances such as this. All that a person would have to do is ignore the action complained of and file an administrative protest at any later date he chose. He could then claim the denial of his protest as the "triggering" determination.

parties could have acted accordingly. With the failure of the Utilities to complain, and given the express provisions of the Memorandum of Understanding, EPA had no reason to step aside, and it accordingly invested great effort in preparing for the hearings. Similarly, DEC had no reason to assume the lead in preparations -- and it did very little. Thus, when the Utilities finally raised their challenge 15 months after the action they complained of, the agencies' positions had changed significantly from what they were in October 1975; and, of course, the 15 months had been lost to the Fishermen, as well as the agencies.

Certainly, one of the principal reasons for imposing a short statute of limitations in Section 509(b) was to avoid exactly this type of situation and to ensure that the regulatory steps necessary to clean up the Nation's water would be implemented expeditiously. See Peabody Coal Co v. Train, supra, at 943; American Petroleum Institute v. EPA, 540 F.2d 1023, 1028 (10th Cir. 1976). If the Utilities' challenge was entertained following their long and costly delay, the intent of the Act and Section 509 would be defeated. The Court should, we respectfully submit, hold that the challenge is barred by the 90-day statute of limitations.

POINT THREE

THE UTILITIES' PETITION FOR REVIEW, AND ANY ACTION IN THE DISTRICT COURT, ARE BARRED BY LACHES

If the Court were to conclude that the 90-day statute of limitations is not applicable here, it should nonetheless hold that any petition for review (as well as any action brought in District Court) is barred by laches.

The requirements for a showing of laches were recently summarized in Ecology Center for Louisiana, Inc. v. Coleman, 515 F.2d 860 (5th Cir. 1975); as follows: "(1) a delay in asserting a right or claim; (2) that the delay was not excusable; and (3) that there was undue prejudice to the party against whom the claim is asserted." 515 F.2d at 867. All three of these requirements are satisfied here.

A. The Utilities Delayed in Asserting Their Claim

The transfer of authority about which the Utilities complain took place in October 1975; and there is no doubt that the Utilities were aware of both the transfer and its terms by that time, if not before.*

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* As set forth in the affidavit of Meyer Scolnick submitted on behalf of the government defendants, the Utilities were sent a copy of the EPA-DEC Memorandum of Agreement evidencing EPA's retained jurisdiction as early as May 1975 (JA. 328, 351). Futhermore, the notice of approval of the State program, as published in the Federal Register, referred explicitly to the Memorandum (JA. 250-51).

Nonetheless, the Utilities waited until February 1977 before raising any question as to EPA's retained authority.

Far from complaining, the Utilities proceeded entirely as though they recognized the validity of EPA's continuing jurisdiction. Thus, virtually all their continued dealings relative to the permits were with EPA, not DEC (JA. 335, 536-37). It was only on the eve of the adjudicatory hearings -- 15 months after their purported claim matured -- that the Utilities suddenly complained.

Such a delay is clearly sufficient to constitute laches where, as in this case (and as described below), the other necessary elements are present. See, Quinn v. U.S., 397 F.Supp. 1250 (D. Mass. 1975), where a dealy of 17 months served as the basis of laches, and Barthelmes v. Morris, 342 F.Supp. 153 (D. Md. 1972), where a delay of eight months was held to bar the action. Also East 63rd Street Association v. Coleman, 414 F.Supp. 1318 (S.D.N.Y. 1976), aff'd by order, 538 F.2d 309 (2d Cir. 1976).

B. The Utilities' Delay Was Not Excusable

It would be impossible for the Utilities to claim that their delay was justified because they did

not know of the State's permit program; and they do not, of course, make such a claim. Indeed, from the history of the permit proceedings contained in their papers, as well as in the Scolnick Affidavit (JA. 362), it is plain that they were well aware of the program and the retained jurisdiction of EPA by October 1975, if not before.

Even so, the Utilities, far from objecting to EPA's right thereafter to conduct the proceedings, actually participated in them for some 15 months without complaint. It light of their timely knowledge, the substantial legal and financial resources at their command, and the fact that they have suggested no justification for their inaction, this delay by the Utilities was clearly inexecusable.

C. The Appellees Have Been Unduly Prejudiced By The Utilities' Delay

The third element of laches, undue prejudice, is also present in this case. Because no complaint was made in October 1975, when the transfer of authority took place, DEC had no reason to begin preparation of the case -- and it did not. EPA, on the other hand, undertook extended analyses, assembling a task force of experts, assigning out work and generally making ready

for the hearings (JA. 336-37, 536-37). If the Utilities' claim were now upheld, much of the EPA effort (including the time and funds that it has invested) would be wasted. Of equal importance, DEC would have to begin from scratch; and it has frankly stated that it probably could not handle the task (JA. 309). Long delays would be certain; and in the meantime, the Utilities' power plants would continue to suck in and kill fish, threatening increasingly serious and potentially irreparable damage to the Hudson.

And it is this latter, in the end, that must be held controlling here. For while wastages of time and funds are not irrelevant, in the final analysis what is really at risk here are the fisheries of the Hudson -- which do not belong to the Utilities, the government or any private group, but to the public. The depletion of the public resources that would result if the Utilities were so belatedly permitted to raise their claim cannot be defended. This action should, in short, be barred by the Utilities' laches.*

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* The Utilities' only response to the laches claim is that laches cannot bar a challenge to a tribunal's subject matter jurisdiction. This argument may have relevance with respect to courts, but has no application to agencies, especially where, as here, EPA issued the permits in the first instance. Not surprisingly, the Utilities cite no cases involving administrative agencies.

POINT FOUR

THE PETITION FOR REVIEW SHOULD IN ANY EVENT BE DISMISSED ON THE MERITS

The Utilities' argument on the merits boils down to a deceptively simply syllogism; (A) The EPA Administrator is required under Section 402(c)(1) of the Act [33 U.S.C. §1342(c)(1)] to suspend issuance of permits for waters subject to a State program within 90 days after he approves that program; (B) The permits in question here were not issued when New York's program took effect; (C) Therefore, the Administrator was required to halt EPA's proceedings as to these permits.

The Fishermen's response to these contentions can be stated plainly: (1) The permits were in fact issued, within the meaning of the relevant provisions of the Act, before the State's program became effective; and (2) the State of New York established a permit program pursuant to EPA approval which provided a continuing role for EPA, and the Act authorizes EPA to accept that role.

A. The Permits Were Issued Before New York State's Permit Program Took Effect

Section 402(c)(1) requires that EPA halt the issuance of permits after approval of a State program.

If the permits in question here had already been issued before the approval was given, the Section can have no bearing. HRFA submits that this was indeed the case, because these permits were issued within the meaning of Section 402(c)(1) when the EPA Regional Administrator issued Notices of Issuance of Final Determination with respect to the permits under 40 C.F.R. §125.35, several months before New York's permit program was approved.* This conclusion is the same as that reached by the EPA General Counsel in OGC Opinion No. 63 (JA. 35) and we believe it to be consistent with both the language of the Act and the intent of Congress.**

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* Eight months in the case of three of the Utilities' plants, and four months in the case of the remaining one.

** Moreover, this interpretation, coming as it does from EPA, is entitled to considerable weight. "This construction by the agency charged with enforcement of the [Act] is reasonable and in the absence of any cogent argument that it is contrary to congressional intentions we sustain the EPA's understanding...." EPA v. California ex. rel. State Water Resources Control Board, 426 U.S. 200, 227, 96 S.Ct. 2022, 2035 (1976). For similar deference to EPA's interpretations of the Act, see E.I. duPont de Nemours & Co. v. Train, supra, 430 U.S. at 134-35, 97 S.Ct. at 977-78; Exxon Corp. v. Train, 554 F.2d 1310, 1322 (5th Cir. 1977); Bethlehem Steel Corp. v. EPA, 538 F.2d 513, 518 (2d Cir. 1976); American Meat Institute v. EPA, 526 F.2d 442, 450 (7th Cir. 1975).

In common usuage, "issued" means "to be published, to be put forth and circulated." Webster's New Twentieth Century Dictionary of the English Language (2d ed. 1976). Certainly in this sense, the permits were issued when they were made public by the Regional Administrator as the final determination of EPA.

The Utilities' response to this common-sense approach is two-fold: First, they say, no permit can be issued by EPA under Section 402(a)(1) until "after opportunity for public hearing", and there was no such opportunity here. Second, the Utilities note that EPA's own regulations [40 C.F.R. §125.35 (d)(2)] stay the effectiveness of the conditions in a permit as to which an adjudicatory hearing is requested. Such a request was made here as to the closed-cycle cooling conditions of EPA's permits, and these conditions, because not yet effective, should be considered not issued.

The Utilities' contentions are invalid. In the first place, there was indeed an "opportunity for public hearing" on these permits, pursuant to EPA regulations [40 C.F.R. §125.34], before the EPA Regional Administrator issued the permits. By public notices issued in 1974 as to three of the Utilities' plants, and in 1975 as to the other, all interested parties were afforded an opportunity

to comment and to request a hearing on the permits [JA. 332, 372-73, 377-78, 382-83, 386-87]. The Utilities took advantage of this opportunity to submit comments [JA. 333]. Thus the requirements of Section 402(a)(1) were satisfied.

It is true that there was no adjudicatory hearing prior to issuance on the permit conditions; that follows issuance, again pursuant to EPA regulations [40 C.F.R. §§125.35, 125.36]. The regulations carefully distinguish between the two type of hearing, one of which (the public hearing) is merely to receive oral or written statements from "any person" [40 C.F.R. §125.34(c)], whereas the other is to "reconsider" the permit and its conditions [40 C.F.R. §125.36(b)(1)] once it has been issued. In such adjudicatory hearings, participation is much more limited [40 C.F.R. §125.36(a)(2)], and extensive procedural requirements are imposed [see, e.g., 40 C.F.R. §125.36(i)].

The Utilities' second contention is also invalid, because there is no basis in the Act or in EPA's regulations for the position that a permit is not issued if an adjudicatory hearing is to be held with respect to it. Rather, as provided in 40 C.F.R. §125.35(d)(2), when an adjudicatory hearing is granted, the effectiveness of the previously issued provisions which are to be the subject

of the hearing is stayed, but neither those provisions nor the permit itself is withdrawn.

The Utilities' position, that permits are not issued until adjudicatory hearings are completed, loses all plausibility when it is considered in the light of the overall intent of Congress as expressed in the Act. That overall intent is not difficult to ascertain. In the words of one Court, "the guiding star is the intent of Congress to improve and preserve the quality of the Nation's waters. All issues must be viewed in light of that intent." American Petroleum Institute v. EPA, supra, at 1028. And not only are the quality of the nation's waters to be enhanced by the Act, but the task is to be done promptly: the 1977 and 1983 deadlines in the Act, and the short periods given for review of EPA decisions in the Court of Appeals, are testimony to "the sense of urgency concerning environmental protection" which Congress expressed in the Act. Peabody Coal Company v. Train, supra, at 943 (6th Cir. 1975). Finally, Congress wanted permits under the program to be issued expeditiously, and without unnecessary duplication of effort. See OGC 63 at 6-10 [JA. 40-45].

Congress' intentions would be frustrated if "issuance" of a permit as defined under Section 402(c)(1) occurred only after that permit and all its conditions

became final, because EPA would then be forced to halt partially completed proceedings and hand them over to the State on approval of its program, even where, as here, the State expressly determined that it did not want such proceedings. The inevitable result would be (1) substantial waste and duplication of effort, as the State moved to redo each stage of the proceedings EPA had already completed; (2) substantial delay, as the State would have to start from scratch on its permit proceeding to avoid any claim by dissatisfied permit applicants that the record on which the State acted was incomplete; and (3) substantial harm to the waters which the Act is supposed to protect, since no regulation of discharges could become effective until the permit proceedings before the State were completed. These consequences make it clear that Congress did not mean that Section 402(c)(1) "issuance" should be given the strained reading proposed by the Utilities, but rather the more natural common-sense reading proposed by the Fishermen, EPA and DEC.

B. EPA's Continuing Role Under New York State's Permit Program is Authorized by the Act Even if the Permits Are Not Yet "Issued" Within the Meaning of Section 402(c).

As stated in their Memorandum of Agreement, both EPA and the State of New York intended that EPA should

continue to carry out partially completed permit proceedings such as those at issue in this case. The burden of taking on all proceedings would have been (and still is) too great for the State to consider assuming [JA. 309]. This role for EPA within the State's program is entirely appropriate.

In the first place, the Act expressly provides that the Governor of each State may submit to EPA for approval the program "it proposes to establish and administer" under the Act [Section 402(b), 33 U.S.C. §1342 (b)]. In the absence of some contrary indication elsewhere in the Act, the natural implication of this language is that this program need not be all-inclusive. This interpretation is strengthened by the statement in Section 402(c)(1) that the Administrator does not surrender all authority within a State with a program, but only "issuance of permits . . . as to those navigable waters subject to such program." Thus a State program can apparently cover less than all of the State's navigable waters and still be approvable by EPA under the Act. Moreover, there is room for concurrent EPA/State authority over the same navigable waters even after a State program is established. See EPA v. California ex. rel. State Water Resources Control Board, 426 U.S. 200, 224 n.39 (1976), where the Supreme Court

held that EPA had to exercise permitting authority over Federal facilities even after a State program covering the waters used by such facilities was established, because the Federal facilities could not be required to obtain State permits.

If the State can assume authority over only some of its waters, and if the State and EPA can exercise concurrent authority over the same water, it would seem logical to conclude that what New York State did here -- that is, agree to assume responsibility in stages, with EPA maintaining its authority at New York's request until the State was able to administer a complete program -- was authorized by the Act. To deny this possibility would be to force the States to accept an "all-or-nothing" situation, and thus prevent many States, lacking the resources necessary to establish a complete program, from establishing any program at all. When one of the purposes of the Act, as the Utilities note, was to provide the States with as large a role as possible in the Act's permit program, such a result surely is anomalous. The power a State has to establish a program, since it includes the right not to establish any program at all, must include the right to establish a partial program suited to the State's needs and capabilities. In this context, there can be

little doubt that the division of responsibility between EPA and DEC, and EPA's continuing role relative to the Indian Point, Bowline and Roseton permits, are proper even if the permits are not yet "issued" within the meaning of Section 402(c).

POINT FIVE

THIS COURT SHOULD DECIDE THE CASE FINALLY

In one respect, we agree with the Utilities: The issues that have been presented through appeal and petition for review should be decided by this Court now. To defer ruling on the questions presented until the on-going EPA hearings are completed will result in uncertainty that can serve no useful purpose. Furthermore, to the extent that issues might have been, but were not addressed, by the District Court, they can appropriately be determined on this appeal, since the case turns entirely on questions of law.

CONCLUSION

For the reasons set forth above, the judgment of the District Court should be affirmed and the Utilities' petition for review dismissed as time barred or, alternatively, on the merits.

Dated: New York, New York
April 24, 1978

Respectfully submitted

BUTZEL & KASS

By Albert K. Butzel
Albert K. Butzel

Attorney for the Hudson River
Fishermen's Association
45 Rockefeller Plaza
New York, New York 10020
Tel.: (212) 765-1800

BUTZEL & KASS
45 ROCKEFELLER PLAZA
NEW YORK, NEW YORK 10020

ALBERT K. BUTZEL
STEPHEN L. KASS
CLIFFORD P. CASE III
BARRY S. NEUMAN
JEAN C. BERMAN

TELEPHONE
(212) 765-1800

STEPHEN A. LEFKOWITZ
COUNSEL

April 24, 1978

Clerk
United States Court of Appeals
for the Second Circuit
U.S. Courthouse
Foley Square
New York, New York

Re: Central Hudson Gas & Electric Corp et al
v. U.S. Environmental Protection Agency et al
Docket Nos. 77-4192 and 78-6032

Dear Sir:

We present herewith for filing ~~25~~ 10 copies of the Brief for the Hudson River Fishermen's Association in the above dockets. The Fishermen are appellees in Docket 78-6032 and intervenors in Docket 77-4192. 9 petitioners

Two copies of the Brief have been served on the attorneys for each party today. In proof, I also enclose the certificate of service.

Very truly yours,

Albert K. Butzel

AKB/gp
Enclosures

BY HAND

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served by hand upon the Attorneys for each of the parties to this proceeding two copies of the Brief of the Hudson River Fishermen's Association, except that the copies served on the State Appellees' have been served by mailing the same, first class postage prepaid, to their attorney, Paul Shemin, Esq., Office of the Attorney General, Two World Trade Center, Room 4772, New York, New York 10047.

Dated: April 24, 1978

Albert K. Butzel